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No. 06-1032

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY C. NEWLAND, WARDEN, *Petitioner,*

v.

MOBASSA BOYD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
GLENN R. PRUDEN
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Telephone: (415) 703-5959
Fax: (415) 703-1234
Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

No. 06-1032

Respondent Mobassa Boyd argues that certiorari should be nied because (1) the Ninth Circuit's decision is a straightforward plication of *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), nich allows federal habeas petitioners to use comparative juror analysis r the first time on appeal; (2) the decision does not conflict with cisions of the Eleventh Circuit and California Supreme Court; (3) the uestion presented lacks exceptional importance; and (4) the erlocutory posture of this case "renders it a poor vehicle for review in y event." Br. in Opp. 7. Boyd's attempt to rehabilitate the Ninth rcuit's decision fails and certiorari should be granted.

1. Contrary to respondent's first point, the Ninth Circuit's decision is good deal "more than a straightforward application" of any purported lding in *Miller-El II* that, under clearly established law, "federal beas petitioners may use comparative juror analyses to support *Batson* . *Kentucky*, 476 U.S. 79 (1986)] claims, even if they did not ecifically present such analyses at trial." Br. in Opp. 6. Respondent's sition is not well-taken because *Miller-El II* does not hold *Batson* early established that a court is *compelled* to conduct *de novo* mparative juror analysis for the first time on appeal.

Respondent also argues that the Ninth Circuit's decision is correct cause *Batson* confirms that, in deciding whether a defendant has ablished a prima facie case, a court must consider the "totality of the evant facts" and "all relevant circumstances." Br. in Opp. 7 (citing *tson* v. *Kentucky*, 476 U.S. 79, 94, 96 (1986)). Respondent accountably views this statement as an assumption by the Court that al judges "implicitly perform comparative juror analyses even if not ecifically requested to do so, and even if not specifically memorialized he record." Br. in Opp. 10. Simultaneously, respondent excuses trial unsel from any obligation to present a comparative jury analysis to the al judge, claiming that "would often be impractical" because it may be o soon in the jury selection process for the prosecutor's estions/challenges to "reveal a pattern of discrimination." Br. in Opp.

10.

That trial counsel need not bother renewing a *Batson* motion in order to detail an alleged "pattern of discrimination" should it become evident later in voir dire is not something the Ninth Circuit has explicitly endorsed, although respondent is certainly right that the decision below lends support to that view. Asking where, precisely, in *Batson* (or for that matter *Miller-El II*) this Court indulged such lassitude on trial counsel's part, and simultaneously presumed such omniscience on the trial judge's part, is pointless. It is not there.

Petitioner's insinuations notwithstanding, there is in this Court's *Batson* jurisprudence no dispensation to attorneys that they need not *show* their *Batson* prima facie case and may rely instead on trial courts to make it for them, or, failing that, to have a federal habeas court hunt for it via a transcript review years later. Renewal of the motion is a common feature of *Batson* hearings. It affords the trial court an opportunity to review its earlier ruling in light of new facts under the applicable *Batson* standard. And when those facts concern comparative jury analysis, the objector's renewal of the *Batson* motion affords the simple courtesy to opposing counsel whose alleged discrimination is at issue of a contemporaneous response concerning the purported "similarity" of the non-minority jurors who, in the final analysis, are not the subject of the *Batson* claim and whose dissimilarities to the minority jurors, even obvious ones, might otherwise be lost to the record if not brought out at the *Batson* hearing itself. There is every reason to require the *Batson* objector to make his case on the record. See *Sorto* v. *Herbert*, ___ F.3d ___, 2007 WL 706894, *5 (2d Cir., Mar.9, 2007) (holding when *Batson* prima facie case depends on suspicious pattern of strikes, petitioner cannot sustain his considerable burden of showing an unreasonable state court action unless he adduces a record of baseline factual circumstances attending the *Batson* challenge); *id.* *6 (holding the record must contain the data on prosecution's strikes so that the federal court "can usefully consider a prosecutorial strike pattern in the essential contexts").

There is no clearly established law from this Court, and respondent cites to none, that imposes a sua sponte obligation on the trial judge to review the voir dire transcript (assuming that daily transcripts or real-

ne transcripts are available)—or, in the more typical case where no nscript is immediately available to remember every word spoken and ery action taken during voir dire—to sift for crucial evidence which ight support an objector's challenge at the first stage of the *Batson* ocess, or which might undermine the prosecutor's explanation(s) at the ird stage of the process, without help from the objector. Respondent's gument does not comport with the realities of criminal trials generally of California voir dire specifically. This Court itself has observed that ir dire in California can be an extraordinarily lengthy ordeal. See *ess-Enterprise Company* v. *Superior Court of California, Riverside unty*, 464 U.S. 501, 510 & n.9 (1984) (where voir dire was over six eks and during oral argument "counsel stated that it is not unknown California courts for jury selection to extend six months").[1/]

On a weightier subject, respondent makes only passing mention in his atement of the Case that the Ninth Circuit initially held this Court's cisions do not clearly establish a rule requiring comparative juror alysis for the first time on appeal. Br. in Opp. 5. It is difficult to see w the Ninth Circuit's original holding fails to undercut its subsequent ading of *Batson* as clearly establishing the constitutionally compelled ture of comparative jury analysis for the first time on appeal—and spondent does not even make an effort to reconcile the two decisions. nce it was clear to the Ninth Circuit before *Miller-El II* that *Batson* d not clearly established any rule requiring comparative analysis for e first time on appeal, the Circuit's new view, ostensibly prompted by *iller-El II*, raises the question of how the rule now could be deemed early established as of the time of respondent's conviction. To say the urt of Appeals recognized its error post-*Miller-El II* is merely another ay of saying *Batson* did not clearly establish the rule, *Miller-El II* did. it, even if that were so, the judgment below would be likewise oneous and certiorari warranted.

2. Respondent also relies on the Ninth Circuit's reading of *Miller-El* as making clear that "'comparative juror analysis is an important tool at courts should utilize on appeal when assessing a defendant's ausible *Batson* claim.'" Br. in Opp. 5 (quoting Pet. App. 126a).

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1. In this case, voir dire occurred on May 20, 21, and 26, 1998.

Neither respondent nor the Ninth Circuit define a "plausible *Batson* claim," a phrase that was not used in *Batson* or its progeny. The only federal cases where it appears are the Ninth Circuit's first and second amended opinions in this case. See generally Pet. App. 81a-132a. We can only surmise that a "plausible *Batson* claim" means something less persuasive than a reasonable inference of discrimination required for a prima facie showing under *Batson*, since the Ninth Circuit failed to find that respondent had made a prima facie case in the state court. Reliance on this novel term of art, found nowhere else in reported federal authority, much less in decisions by this Court, further undercuts the judgment below that *Batson* clearly established constitutionally compelled comparative juror analysis for the first time on appeal.

3. Respondent correctly argues that petitioner does not dispute that comparative juror analysis can be relevant to a *Batson* claim. But the relevance of the theory in a given case is not the determining factor in deciding whether comparative juror analysis used for the first time on appeal is constitutionally required. The dispositive point is that this Court has never held comparative juror analysis compelled in all (or even most) circumstances and, more particularly, for the first time on appeal. The reference in *Batson*, 476 U.S at 97, to comparative juror analysis was merely illustrative of the types of evidence that might be relevant to the *trial court*. *Batson* spoke to how an equal protection challenge to a peremptory challenge can be *established*, not how the appellate record is to be put together for review or, still less, what new theories aggrieved *Batson* objectors may compel reviewing courts to analyze when the objector did not present the underlying facts to the trial court.

4. Respondent distorts the significance of footnote 2 in *Miller-El II* with regard to any requirement to provide a complete voir dire transcript for comparative juror analysis for the first time on appeal. What is clear is that the entire voir dire transcript was before the Texas courts, including the trial court, on remand for application of *Batson* on direct appeal. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 329, 343 (2003) (noting that the Texas trial court found, *inter alia*, "no disparate prosecutorial examination of any of the veniremen in question" and that the prosecutor's dismissals were not based on race). As *Miller-El II* makes

ear, it was from the voir dire transcript that arguments based on mparisons of black and non-black panelists, and the use of jury uffles by the prosecution, were made.[2] The only items of evidence out which there was any dispute concerning their availability to the ıte courts were the juror questionnaires and juror information cards. :e *Miller-El-II*, 545 U.S. at 236, 241 & n.2; *id.* at 256 n.15. Texas did t object to this evidence, which was introduced to the federal district urt on habeas corpus, or insist that Miller-El's claim be evaluated in ght of the evidence presented to the state courts. Indeed, Texas firmatively relied on some of the new evidence in federal court itself. . at 256 n.15. Thus, this Court engaged in comparative analysis in *iller-El II* only after a similar analysis had been conducted in the state al court, and with the acquiescence (and active participation) of the rties. The relevant point decided in *Miller-El II*, to which both the spondent and the Ninth Circuit are seemingly oblivious, was that Texas that case waived whatever objection it might have had to expanding e record to conduct comparative jury analysis, not that *Batson* nstitutionally *eliminated* objections to *de novo* comparative jury alysis on appeal.

Any comparative-juror-analysis argument respondent might make in is case is not simply a new theory on the evidence before the state urt, as was the case in *Miller-El II*. Hence, respondent's reliance on *arris Trust & Savings Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 8, 245 n.2 (2000), and *Lebron* v. *National R.R. Passenger Corp.*, 513 S. 374, 379 (1999), is misplaced. Rather, his situation is analogous to e one in *Giordenello* v. *United States*, 357 U.S. 480, 488 (1958), where is Court found that allowing the Government to raise a new theory at ubsequent stage of the case "would unfairly deprive" the defendant of opportunity to respond. Respondent's failure to make his mparative juror analysis in the trial court deprives both the prosecutor d the trial court "an adequate opportunity to respond" with reasons or

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2. At the hearing on remand, in addition to the explanations contained in the voir dire record for some of the challenged strikes, one of the prosecutors gave his justification for those strikes that were previously unexplained. *Miller-El II*, 545 U.S. at 236.

observations not readily apparent from the cold voir dire record, at a time when the relevant events are fresh. Instead, the prosecutor is placed in the disadvantageous position of having to reconstruct his thinking years after the voir dire, either on remand to the trial court or in a federal habeas evidentiary hearing. And, to the extent that comparative analysis is undertaken in a federal habeas evidentiary hearing, the likelihood of any meaningful input from the trial judge is nil.

5. Respondent notes that the California Supreme Court granted review in *People* v. *Lenix*, 2006 WL 2925354 (Cal. App. 5 Dist., Oct. 13, 2006), to address the issue of whether an appellate court must perform comparative juror analysis for the first time on appeal in light of *Miller-El II*. Br. in Opp. 12. He speculates, "There is every reason to believe that the California Supreme Court in *Lenix* will realize – just as the Ninth Circuit did in this case – that *Johnson* is not good law in light of *Miller-El II*." *Id.* Hence, according to respondent, there is or soon no longer will be any conflict between the California Supreme Court and the Ninth Circuit. However, it is just as likely that the California Supreme Court in *Lenix* will reaffirm its consistently held position that comparative juror analysis will not be undertaken for the first time on appeal, refuting any claims made in reliance on the Ninth Circuit's opinion in this case that *Miller-El II* somehow made clear that comparative juror analysis for the first time on appeal was constitutionally compelled.

Respondent's optimism is difficult to square with the California Supreme Court's post-*Lenix* review grant opinion in *People* v. *Bell*, 40 Cal. 4th 582, 151 P.3d 292, 54 Cal. Rptr. 3d 453 (2007);[3] see also *People* v. *Anderson*, ___ Cal. Rptr. 3d ___, 2007 WL 962876 *6 (Cal. App. 3 Dist., Apr. 2, 2007) (holding missing record preventing comparative jury analysis on appeal not a violation of due process. In *Bell*, as here, the defendant failed to meet his burden of establishing a prima facie case "because he presented no factual circumstances other than the numbers of peremptory challenges used against each group—which in this case were too small to raise, by themselves, any

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3. Review in *Lenix* was granted January 24, 2007, while *Bell* was filed February 15, 2007.

ference of discrimination—and a record of voir dire that appellate unsel himself characterized as 'unremarkable.'" 40 Cal. 4th at 600, 1 P.3d at 304, 54 Cal. Rptr.3d at 468. Therefore, while recognizing e California Supreme Court's "past reluctance" to perform mparative juror analysis for the first time on appeal, Bell argued that e court should reevaluate its practice "in light of *Miller-El* [*II*]." *Id.*[4/] ıe California Supreme Court declined, stating that *Miller-El II* "does t mandate comparative juror analysis in these circumstances," i.e., "in irst-stage *Wheeler-Batson* case when neither the trial court or the viewing courts have been presented with the prosecutor's reasons or ve hypothesized any possible reasons," 40 Cal. 4th at 601, 151 P.3d at 5, 54 Cal. Rptr. 3d at 468, thus only very recently adhering to its long-ınding rule against performing comparative juror analysis for the first ıe on appeal.

6. Respondent attempts to distinguish *Hightower* v. *Terry*, 459 F.3d 67 (11th Cir. (2006), *pet'n for cert. filed* (No. 06-1209, 2007 WL 0933 (U.S.)) (Feb. 8, 2007), and *Atwater* v. *Crosby*, 451 F.3d 799 1th Cir. 2006), *cert. denied*, 127 S. Ct. 951 (2007), as being grounded the "heightened federalism concerns that arise when a state prisoner eks federal habeas relief on a basis he never even attempted to present *any* state court." Br. in Opp. 14. This directly conflicts with his gument that petitioner "'conflates the difference between *evidence* that

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4. Respondent would have this Court believe that the California Supreme Court's rule against performing comparative juror analysis for the first time on appeal was not a well-established practice at the time of his trial and did not become so until *People* v. *Johnson*, 30 Cal. 4th 1302, 71 P.3d 270, 1 Cal. Rptr. 3d 1 (2003). See Br. in Opp. 8 n.1 (citing *People* v. *Bittaker*, 48 Cal. 3d 1046, 1091-92 & n. 27, 774 P.2d 659, 259 Cal. Rptr. 630 (1989)). This is simply not so. A careful reading of *Bittaker* shows that the California Supreme Court there merely refuted, in passing, the purported similarity of white jurors in a comparative analysis argument Bittaker had made, not that the court had deemed itself obligated to analyze voir dire of jurors never brought to the trial court's attention. Earlier, in *People* v. *Johnson*, 47 Cal. 3d 1194, 1220-21, 767 P.2d 1047, 1056-57, 255 Cal. Rptr. 569, 578-79 (1989), the California Supreme Court had announced its disapproval of employing comparative juror analysis for the first time on appeal.

must be presented to the state courts to be considered by federal courts in habeas proceedings and *theories about that evidence.*'" Br. in Opp. 9 (internal citation omitted, emphasis added). Hightower's certiorari petition makes it apparent that the entire voir dire record was before the state courts even though Hightower never made a comparative juror analysis argument in that forum. See 2007 WL 700933 at *23-25. If comparative juror analysis is simply another theory about the same evidence, and is constitutionally compelled as part of the *Batson* analysis, then it should not matter that Hightower never made a comparative juror analysis argument to the state courts. Like California and in contrast to respondent, Hightower certainly believes that the holding of the Eleventh Circuit in his case directly conflicts with the Ninth Circuit's holding in respondent's case. *Id.* at *23-27.

7. Respondent complains that it is impossible to know conclusively whether his counsel made further objection under *Batson*, documented for the record the final composition of the jury, or made a comparative juror analysis argument at trial, because the State produced only a transcript of the voir dire of Ms. Brown. But the minute entries in the Clerk's Transcript reveal that the only *Batson* objection made involved the prosecution's peremptory challenge of Ms. Brown. See *Smith* v. *Smith*, 157 Cal. App. 2d 658, 662, 321 P.2d 886, 889 (1958) (noting presumption that an official duty is regularly performed and court's minutes are correct); *Wyman* v. *Municipal Court of City and County of San Francisco*, 102 Cal. App. 2d 738, 740, 228 P.2d 89, 90 (1951) (holding permanent minutes constitute only official record of court's action and "import absolute verity unless and until amended"); Cal. Evid. Code § 664 ("It is presumed that official duty has been regularly performed."). Respondent has never alleged that trial counsel made additional *Batson* objections, a comparative juror analysis argument, or renewed his objection to the peremptory strike of Ms. Brown, nor do respondent's requests for augmentation of the record on appeal to the California Court of Appeal contain any such representations. All are matters well within the knowledge of respondent who was present at trial and could have presented them as additional justification in his repeated attempts to augment the record with additional portions of the voir dire transcript on appeal and in the district court, but he did not.

8. The Ninth Circuit's ruling cannot be viewed narrowly as one that erely requires the State to give indigent habeas petitioners who raise lausible *Batson* claims" a complete voir dire transcript, as respondent gues. Br. in Opp. 15. Rather, it allows California prisoners who raised *ıtson* claims without presenting a comparative juror analysis at trial to esent such theories not only on federal habeas, but for the first time on peal in state court. Absent the federal court's identification of a rported clearly established constitutional rule applicable to the State the time of petitioner's appeal, the Ninth Circuit could not have dered the State, as it did, to violate its own state appellate procedures providing respondent with a complete voir dire transcript.

Contrary to petitioner's assertion, the impact of the Ninth Circuit's inion is not extremely limited. If defendants have the most to lose in criminal trial, then defendants too should view with jaundiced eye the nth Circuit's unstinting effort to mandate appellate court record pansions of the *Batson* prima facie case requirement. "Considered in rely pragmatic terms . . . the . . . holding may fail to advance ndiscriminatory criminal justice." *Georgia* v. *McCollum*, 505 U.S. 42, (1992) (O'Connor, J., dissenting). For example, it allows the States undermine a valid but unrecognized prima facie case for the first time the defendant's appeal with a comparative analysis of challenges to imilar jurors" which the defendant, by definition, had no opportunity rebut in the trial court.

The decision below disturbs the carefully calibrated *Batson* framework other ways. It is authority that federal habeas courts in California ses *must* conduct comparative jury analysis *de novo* when state courts ect a *Batson* prima facie case without doing so. This is true regardless whether the parties actually had a complete voir dire transcript on ect review or whether the objector asked the state court on appeal to nduct such analysis, since the California Supreme Court rejects a right comparative jury analysis for the first time on appeal. Even in cases prisoners from States with no such rule, the Ninth Circuit's decision plicitly deems the federal habeas court competent to review a cold nscript *de novo* in order to decide which venirepersons were "similar" excused minority jurors, to winnow out an inference that peremptory allenges were used with an improper motive—whether or not the facts

underlying that conclusion ever had occurred to anybody in any of the earlier state proceedings. If left unreviewed, the decision below will prove the harbinger for substitution of federal habeas courts for trial judges as the ultimate factfinder contrary to the clear intention of this Court in *Batson*.

As to respondent's interlocutory objection, the only way this Court would have jurisdiction to hear the comparative juror analysis/*Batson* claim at issue here, after remand, would be if respondent obtained relief on his *Batson* claim employing comparative juror analysis in the district court.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 10, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

GLENN R. PRUDEN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner